IN THE HIGH COURT OF JUDICATURE AT BOMBAY.

APPELLATE SIDE.

CRIMINAL APPEAL NO. 77 OF 1996

PANDURANG SHIVRAM SAWANT]
AGE 58 YEARS,OCCU. DAIRY,]
RESIDING ATMAHAD.] ...APPELLANT.

VERSUS.

1. RAMESH SUNDAR SADVILKAR]
AGE 40 YRS., RESIDING AT] ..RESPONDENTS.
MAHAD NAVENAGAR, MAHAD] (ORIG.ACCUSED)
2. THE STATE OF MAHARSHTRA]

Ms. Nayana Thatte for the appellant.

Mr. Uday Y. Arolkar & Mrs. S.S.Chinchalkar for the Respondent NO.1.

Mr. B.H.Mehta, PP for the State.

CORAM : S.K. SHAH, J.

DATE : December 6, 2004.

ORAL JUDGMENT

1. This Appeal is filed by the original complainant against the Judgment and Order of acquittal of the Respondent No.1 - accused of the offence punishable under Section 138 of the Negotiable Instruments Act, passed by the Judicial Magistrate, First Class, Mahad, in Criminal case No.88 of 1994.

2. The case of the complainant was that the complainant and accused had friendly relations. The accused often used to visit the shop of the complainant. On 19.9.1993, the accused went to the complainant and made a demand of hand loan of Rs. 10,000/-. The complainant, however, did not have that much amount of Rs. 10000/-. He allegedly paid Rs. 8,500/- to the accused. The accused promised to repay that amount within two days. The complainant allege that the accused, however, failed to make repayment of that amount within two days as agreed. Even after repeated demands, he failed to repay that amount. Ultimately, the accused issued a cheque dated 5.10.1993 for Rs. 8,500/- to the complainant against the said hand loan amount. The complainant presented that cheque in the Bank on 4.1.1994. on the same day, it was dishonoured for want of sufficient funds in the account of the

accused. Therefore, he served the accused with a notice dated 13.1.1994, requiring him to pay the amount of the cheque. The notice was received by the accused on 15.1.1994. The accused, however, failed to pay the amount of the cheque and, therefore, the complainant filed the complaint on 2.2.1994.

3. The accused pleaded not guilty the charge levelled against him for commission of offence punishable under Section 138 of the Negotiable Instruments Act. His defence was that he did not receive any hand-loan amount of Rs. 8,500/- from the complainant. In fact, he had issued the cheque in favour of the complainant, concerned with the Lottery Draw of a Lucky Draw Scheme.

4. The complainant led his evidence and the evidence of Yeshwant Nathu Kalmankar, the Assistant Branch Manager of Mahad Urban Bank, to show that there was insufficient fund in the account of the accused. The accused, on the other hand, examined himself in support of his defence.

5. Having considered the evidence, the learned Judicial Magistrate, First Class, came to the conclusion that the cheque of Rs. 8500/-, dated 5.10.1993 was a post - dated cheque, issued on 18.9.1993. Therefore,

held that the consideration was not proved. He further held that, in fact, the complainant had issued the first notice on 30.10.1993 [Exhibit 29], which had given the cause of action to the complainant for filing the complaint. However, the complaint was not filed within the stipulated time. The second notice was given on 4.1.1994 and it is, thereafter, that the complaint was filed, which is not maintainable.

. Under the circumstances, the learned Magistrate passed the Order of acquittal, which is assailed in this Appeal.

6. The learned Counsel for the Appellant submitted that there is a presumption of the cheque having been issued for consideration and, therefore, the learned Magistrate has committed an error in passing the Order of acquittal. On the other hand, the learned Counsel representing the Respondent No. 1- accused submitted that the view taken by the learned Magistrate that the cheque was a post dated cheque issued on 18.9.1993, was correct. He further submitted that the view of the learned Magistrate that the complaint was time barred by limitation, as it was not filed within the prescribed period from the date of the first notice, which was dated 30.10.1993, was correct.

7. The complainant has stated that on 19.9.1993, the accused approached him and demanded Rs. 10000/- as a hand loan. However, on that day, he gave the accused Rs. 8500/-. He further states that inspite of repeated demands, the accused failed to repay the amount and ultimately, issued a cheque, drawn on Mahad Urban Bank. He then presented the cheque in the bank on 4.1.94 but it was dishonoured. The Bank employee Mr. Yeshwant Kalmankar has produced the extract of the account of the accused at Exhibit-23, showing that on 4.1.1994 there was only balance of Rs. 170.95 Ps. in the account of the accused. Therefore, the cheque was required to be dishonoured.

8. A specific case of the complainant is that he paid amount of Rs. 8500/- as hand loan to the accused on 19.9.1993, however, the defence of the accused is that he had issued the cheque on 5.10.1993 but that was concerned with a Lucky Draw Scheme, which was run by Dr. Choche and Dilip Sadwilkar, who happened to be the brother of the accused. The name of the scheme was ‘Golden Chance Bhavya Bakshis Yojana 1992-93.’

9. It is an admitted position that the complainant was one of the members of this scheme. Some amount was due from the accused to his brother Dilip Sadwilkar and, therefore, on 11.9.1993, it was agreed that the accused

would pay Dilip Sadwilkar Rs. 83000/- and that he would make that payment on 18.9.1993. However, on 18.9.1993, Dilip Sadwilkar did not turn up and, therefore, he prepared three cheques, one in the name of the complainant and the others in the name of Manohar Gandhi and Trishul Sawant. In support of this defence, the accused has produced three counter foils of these cheques at Exhibit 30 to 32. Two of the counter foils bear the signatures of the complainant as also the date as 18.9.1993. The third counter foil also bears the signature of the complainant, but there is no date on it. This, however, corroborates the defence of the accused that he had issued three cheques on the same day and they were given to the complainant on 18.9.1993. Although on the third cheque counterfoil, there is no date, in view of the aforesaid circumstances, it has to be held that the third counterfoil, in respect of the cheque concerning this case, was also given to the complainant on 18.9.1993.

10. The aforesaid evidence itself rebuts the presumption arising under Section 139 of the Negotiable Instruments Act with regard to the cheque having been issued for consideration. This itself, therefore, negatives the case of the complainant that on 19.9.1993, the accused had demanded Rs. 10000/- and he paid Rs. 8500/- to the accused by way of hand loan. In fact, the

cheque in question, dated 5.10.1993 was issued and handed over to the complainant on 18.5.1993. Therefore, consideration, as alleged by the complainant is not proved at all.

. There is no other evidence led by the complainant to prove that as to for what consideration, the cheque for Rs. 8500/- was issued by the accused in favour of the complainant. Under these circumstances, the learned Magistrate has correctly held that the cheque was not issued for the consideration, as alleged by the complainant.

11. Secondly, the first notice dated 30.10.1993, which is produced at Exhibit 29 shows that it was issued by Advocate Mr.Marathe for and on behalf of the complainant, addressed to the accused. By this notice a demand of Rs. 8500/- was made, on the basis of cheque dated 5.10.1993.

. As per the provisions of Section 142 (b) of the Negotiable Instruments Act, the complaint is required to be filed within one month from the date on which the cause of action has arisen to try an offence. In this case, on his own showing, the cause of action for filing the complaint arisen to the complainant on 30.10.1993, the date when the first notice was issued by the

complainant i.e. long back from the date of the instant complaint. Further the notice also mentions that this cheque was presented to the Bank but it was returned by the bank with remarks "refer to the drawer". Therefore, this had given a cause of action to the complainant to file the complaint. However, no complaint was filed within one month from that date. What the complainant did was that he presented the cheque again on 4.1.1994 and after it was dishonoured, he filed the present complaint. This, however, was a time barred action.

12. Under these circumstances, the view taken by the learned Magistrate was correct. The Order of acquittal was, therefore, justified. I do not find any merit in the Appeal. The appeal deserves to be dismissed. Hence, the Order :-

ORDER

1. The Appeal is hereby dismissed.

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[S.K.Shah, J.]

Godbole

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

CRIMINAL APPEAL NO. 77 OF 1996

Date of Decision : December 6, 2004.

For Approval and Signature :

The Honourable Mr. Justice S.K. Shah :

1. Whether Reporters of Local Papers may be allowed to see the Judgment?

2. To be referred to the Reporters or not?

3. Whether Their Lordships wish to see the fair copy of the Judgment?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950, or any Order made thereunder?

5. Whether it is to be circulated to the Civil Judges ?

6. Whether the case involves an important question of law and whether a copy of the Judgment should be sent to Nagpur, Goa and Aurangabad office?

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and USA during the period between 15th December, 2004 and 23rd December, 2004 (both days inclusive) on the following conditions :-

(a) The applicant shall furnish to the C.B.I. his itinerary and contact addresses and the telephone numbers at Singapore and U.S.A.;

(b) The applicant shall remain present in Court on all the dates when the case is fixed on board.

. The applicant - accused has deposited Rs. 5 lac with the Officer on Special Duty, Bombay by virtue of the Order passed by this Court in M.A. No. 191 of 2003 and M.A. No. 258 of 2004 in Special Case No. 2/1997. The learned Counsel for the applicant submits that the same is still in this Court and the same shall be treated as deposit in this Misc. Application. Hence,

the amount of Rs. 5 lac deposited in M.A. No. 191/2003 and M.A.No. 258/2004 be treated as deposit in respect of this Misc. Application.

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[S.K.Shah, J.]

Judge,

Special Court.